

PD-0395-20

NICOLE P. SELECTMAN

§

IN THE COURT OF

FILED

COURT OF CRIMINAL APPEALS

10/19/2021

DEANA WILLIAMSON, CLERK

VS.

§

CRIMINAL APPEALS

§

STATE OF TEXAS

§

OF TEXAS

MOTION FOR REHEARING

TO THE HONORABLE COURT OF APPEALS:

NOW COMES, appellant, NICOLE P. SELECTMAN, who, by and through her appellate counsel of record, Mr. Dean A. Diachin, and pursuant to TEX. R. APP. P. 79.1, does hereby file this motion for rehearing, and in support thereof would show this Honorable Court the following:

I. Procedural History.

After an initial trial ended 10-1 in favor of acquittal,¹ another jury convicted appellant on July 14, 2018 of aggravated assault of a household, dating, or family member. The next day, appellant received ten [10] years' in prison and no fine. The court of appeals affirmed this judgment on March 25, 2020. Discretionary review was granted on November 25, 2020 and all briefs were filed by March 16, 2021. The case was submitted for formal decision on June 2, 2021.

1. One juror became sick and the parties agreed to proceed with eleven [11] jurors.

Nearly three-and-half [3.5] months later, on September 15, 2021, appellant's petition was dismissed as improvidently granted. This motion for rehearing then followed. TEX. R. APP. P. 79.1 (West 2017).

II. Grounds Relied Upon for Rehearing.

A. Substantive Evidence Supports The Defensive Issues Requested.

The State advocated for the instant dismissal on grounds that the evidence supporting the defensive instructions requested below has no substantive value. Here, that supporting evidence includes Erica Rollins' 2017 confession to Tracy Thomas that Rollins falsely reported appellant to the police on April 2, 2015. However, Rollins' prior inconsistent statements may qualify as both impeachment and substantive evidence so long as they were admitted through a valid hearsay exception. *See Dansby v. State*, 530 S.W.3d 213, 229 (Tex. App.—Tyler, pet. ref'd) (stating, “[o]nce an opponent of hearsay objects, it becomes the burden of the proponent to establish that an exception makes the hearsay admissible”). Rollins' confession was so admitted. *See, e.g.*, (4 RR 126-127) (demonstrating defense counsel specifically relied on language in Texas Rule of Evidence 803(24), and then argued, “So it's an exception to hearsay”); (4 RR 127) (ruling by trial court, “[Tracy Thomas] is going to testify”).

Rule 803(24) is a valid exception for Rollins' confession because her prior inconsistent statements both: (1) exposed Rollins to criminal liability;² and (2) were corroborated by circumstances that clearly indicated her confession is trustworthy. *See Bingham v. State*, 987 S.W. 54, 57 (Tex. Crim. App. 1999) (stating, "[i]f both these criteria are met, then rule 803(24) is satisfied"). Evidence so admitted may be considered as substantive evidence of the truth of the matters asserted. With regard to the confession itself, the jury heard the following:

- Rollins kept a boyfriend "behind Nicole's back," i.e., someone who appellant did not know and would not recognize. (4 RR 129).
- "Nicole came home from work [on April 2, 2015] ... and she [Rollins] and her boyfriend were arguing about money". (4 RR 129).
- Rollins was "really afraid" of her boyfriend. (4 RR 129).
- Nicole "instantly came upstairs to [Rollins'] defense". (4 RR 129).
- "Nicole went upstairs and ... started tussling with [the intruder] because he was tussling with Erica." (5 RR 150).
- Rollins' boyfriend threatened to kill Rollins, Nicole, and Nicole's child if Rollins failed to implicate appellant. (4 RR 159).
- "[Rollins] was tearing up ... [and] told me that Nicole was in trouble for something that she didn't do". (4 RR 129).

2. *See* TEX. PENAL CODE § 37.08 (West 2015) (providing that giving false, material statement to criminal investigators is Class B misdemeanor).

Additional circumstances indicating that Rollins' confession is trustworthy were also admitted below by: (1) former Federal agent Roderick Malone; (2) appellant's friend Regina Spears; and (3) Rollins, herself. Malone indicated that in December 2014, Rollins introduced him to Rollins' fiancé, "Mac," and Malone later discovered Rollins' photographs on a Craigslist ad for in-call/out-call "massage therapy". (4 RR 168, 187). Similarly, Spears testified that in August of 2015, Rollins and a man named "Mac" tried to recruit Spears to participate in a sex trafficking enterprise. (4 RR 201-211). Rollins, for her part, freely admitted she sold sex toys and that certain "still shots" taken from Backpage.com likewise included her photographs. *See* (3 RR 103, 113) (claiming, "it's like Mary Kay"). Although Rollins never identified for Thomas the name of the man who appellant observed assaulting Rollins in their own home, the corroborating details above permitted jurors to rationally infer that the assailant was Rollins' adulterous boyfriend, "Mac." Rollins' statements to Thomas were thus properly admitted as substantive proof of the matters asserted, and were not relegated to impeachment evidence only.

**B. The Record is Sufficient to Support The
Defensive Issues Requested.**

Members of law enforcement who harm innocent third parties during a lawful act of self-defense are seldom if ever charged. The Breonna Taylor and Legend Smalls cases cited in appellant's reply brief are good examples.

Prosecutors and grand jurors, alike, often view such lawful acts of self-defense as negating the mental state required to turn even the most tragic of results into an offense. Officers thus many times get a pass.

Appellant is simply advocating for an instruction that applies this same principle to civilians, even those for whom the evidence for self-defense is considered weak, contradicted, or not worthy of belief by the State. Here, if a factfinder were to credit the instant record that suggests appellant caused Rollins' injury while defending herself or Rollins against a violent home intruder, then Rollins' injury would be no less justified or excused as those that Ms. Taylor or baby Smalls suffered. That is, any legal theory that both finds support in the record and would serve to negate the mental state required for the offense charged is a theory about which the jury should be instructed properly. If appellant may be denied a self-defense instruction under these circumstances (i.e., firing a single shot at an intruder who is found assaulting a loved one in their own home), then so too may a law enforcement officer patrolling our cities' streets. All that would be required is a prosecutor who chooses to disbelieve the evidence supporting a finding of lawful self-defense, which of course may come from any source. But the contents of a jury charge should be not be determined simply by what the prosecutors believe, but rather by what an objective evaluation of the record reveals.

Notably, a different result will no doubt apply to actors charged with recklessly injuring an innocent third person, even if effected during an otherwise lawful act of self-defense. *See* TEX. PENAL CODE 9.05 (West 2015). However, Section 9.05 does not apply here for two [2] reasons. First, our record contains evidence from which the jury could rationally infer that Rollins and her boyfriend were arguing over money because they were engaging in sex trafficking at the time of the offense. This record at least raises a question of fact as to whether Rollins was indeed an “innocent third person”. Second, even if Rollins was somehow innocent, this prosecution was not “for the *reckless* injury of the innocent third person.” *Id.* The culpable mental state alleged here was always “intentionally and knowingly,” (1 CR 6), and neither party ever requested any instruction on a lesser-included offense that would implicate Section 9.05. Thus, that section does not apply.

Finally, appellant will concede the instant defensive issues would have been foreclosed if *causation* was ever denied,³ but that is also not the case here.

3. *E.g., Torres v. State*, 2019 WL 3229187, at *3 (Tex. App.—San Antonio 2019, no pet.) (finding no error when self-defense instruction denied because, “[w]hen asked if he knew how [the complainant] sustained her injuries, [the defendant] denied knowing and suggested she intentionally caused them to herself”).

III. Conclusion.

Appellant maintains the court of appeals failed to view the evidence in the light most favorable to the instructions requested. Appellant also notes the opinion below was issued without the benefit of *Ebikam v. State*, PD-1199-18, 2020 WL 3067581 (Tex. Crim. App. June 10, 2020), which held that a defendant does not have to admit the alleged manner and means of assault so long as she does not “flatly deny” the offense charged. It should not matter whether there is evidence that appellant shot the gun or admitted to otherwise illegal conduct so long as appellant did not offer evidence that foreclosed self-defense. If, as the instant record shows, there is evidence that Rollins was shot as a direct result of appellant’s fight with a home intruder, the jury should have been permitted to weigh that defense even if it concluded that appellant did not fire the shot that injured Rollins. That is, appellant should have been held to no standard different than the men who shot Breonna Taylor or Legend Smalls.

Finally, appellant submits the court of appeals based its harm analysis on the fact of conviction without any consideration of how the jury’s deliberations would have changed had the defenses requested been included here. For example, proper instructions would have treated when use of force is presumed to be reasonable when dealing with home intruders. Because she was denied these properly supported instructions, appellant has been harmed.

IV. Prayer

WEREFORE, PREMISES CONSIDRED, appellant respectfully requests this Honorable Court grants the instant motion for rehearing, reverses the judgment of the court of appeals, and remands this case to the trial court for a new trial.

Respectfully submitted,

/s/ Dean A. Diachin

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing motion has been e-served upon: (1) Bexar County District Attorney's Office, Appellate Division, 101 W. Nueva St., San Antonio, TX 78205; and (2) State Prosecuting Attorney's Office, 209 W. 14th Street, Austin, TX 78701 on October 15, 2021.

/s/ Dean A. Diachin

DEAN A. DIACHIN

Bexar County Asst. Public Defender.

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